SINGAPORE REPORT

RE VALIBHOY CHARITABLE TRUST

[O.C.J. (Winslow J.) February 28, 1975]
[Singapore — Originating Summons No. 97 of 1974]

Trusts and Trustees — Charity — Trusts to be carried out in India — Impractical to carry out intentions of testator — Whether there is a general charitable intention — Whether capital and income can be applied cy-pres.

The testator by his will directed that ⅓ of his property be held on certain trusts for building and maintaining a school for the education of persons in the English language and general matters in Jetpur, Khatiawar, India. The specific trusts could not be carried out as permission was refused for the building of the school in India. The question raised in the Originating Summons was whether in the circumstances the trusts declared in the will of the deceased have become impracticable and if so, whether the capital and income set aside for the said trusts ought to be applied cy-pres or whether such capital and income ought to be distributed as on an intestacy among those persons entitled thereto according to Muslim law.

Held: (1) in the circumstances it had become impracticable to carry out the intentions of the testator set out in the will;

(2) the testator had evinced a general charitable intention in favour of the advancement of education amongst members of the Gatchee Community to which he belonged and therefore in the circumstances the trusts have not failed but should be carried into effect cy-pres by a scheme which conforms to his directions as closely as possible;

(3) such a scheme should be prepared by the trustees for approval of the court.

Cases referred to:-

(1) *Re Valibhoy deceased* [1961] M.L.J. 187.
(2) *In re White's Will Trusts* [1955] 1 Ch. 193.
(3) *Attorney-General (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (1940) 63 C.L.R. 224.
(4) *Biscoe* v. *Jackson* (1886) 35 Ch. D. 464.
(5) *In re Whittaker deceased* [1951] 2 T.L.R. 955.
(6) *In re Templemoyle Agricultural School* (1869) L.R. 4 Eq. 295.
(7) *Wallis* v. *Solicitor-General for New Zealand* [1903] A.C. 173.
(8) *In re Packe* [1918] 1 Ch. 437.
(9) *In re Wilson* [1913] 1 Ch. 314.
(10) *Re Good's Will Trusts* [1950] 2 Ch. 653.

ORIGINATING SUMMONS.

H. M. Dyne for the trustees.

Eric Choa for the beneficiaries.

Warren Khoo (Dy. Senior State Counsel) for the Attorney-General.

Winslow J.: The question which I have to decide is whether, upon the true construction of the Testator's Will made on 12th April 1948 and in the events which have happened since his death on 8th April 1950, the trusts declared by Clause 4(i), (ii), (iii) of the said Will have become impracticable and, if so, whether the capital and income set aside for the said trusts ought to be applied cy-pres or whether such capital and income ought to be distributed as on an intestacy among those persons entitled thereto according to Muslim law.

The trusts thereby declared are three of the four trusts set out in Clause 4 and described collectively therein as the "Valibhoy Charitable Trust".

A one-third share of the Testator's net estate (less a sum of Rs.50,000 whose destination does not concern us) has been appropriated and set aside for the purposes of the said Trust and is being held for charitable purposes upon the aforesaid four trusts, subject to the provisions of Clause 6 of the said Will, as follows: —

"(i) To employ 30% of the capital of the Valibhoy Charitable Trust and any net income from time to time arising from such 30% for the purpose of buying of land and buildings for and/or for building, maintaining, improving and establishing one or more schools at my trustees absolute discretion for religious instruction (known as Mardarsahs) and one or more schools at my trustees absolute discretion for the education of persons in the English language and general matters. In connection with such schools I give to my trustees the following directions namely:—

(a) Such schools shall, subject to the provisions hereinafter contained, be established in Jetpur in the state of Khatiawar, or at places in its neighbourhood, and

(b) Persons who profess the Mohamedan religion and are of the Gatchee class shall be given preference at all times in attending such schools as scholars.

(ii) To invest 50% of the capital of the Valibhoy Charitable Trust in the investments hereinafter authorised and to use the net income arising therefrom for the general upkeep and maintenance of all or any of such schools and for the provision of scholarships to such schools and to pay for the salaries, accommodation and food of teachers, managers and other staff of the said schools and generally for the benefit of the said schools in such manner as my trustees shall in their absolute discretion think fit.

(iii) To invest 10% of the capital of the Valibhoy Charitable Trust in the investment hereinafter authorised and to use the net income arising therefrom in the repair and improvement of the said schools notwithstanding that there may be other moneys available for the said purpose.

(iv) To invest the remaining 10% of the capital of the Valibhoy Charitable Trust in the investments hereinafter authorised and to pay such part of the net income arising therefrom as my trustees shall in their absolute discretion think fit to or for the benefit of such of my sons and daughters as shall from time to time be indigent and to pay and use any balance of the net income arising from the said remaining 10% of the capital of the Valibhoy Charitable Trust to or for the benefit of such persons of the Gatchee class as shall profess the Mohamedan Sunni Hanafee religion and be indigent as my trustees shall in their absolute discretion think fit."

After the death of the Testator in 1950 there appears to have been dissension between two of the trustees of this estate, as a result of which little was done towards implementing the trusts with which I am now concerned until a later action commenced by the Attorney-General, on the relation of a Mr. Kassam Mohamed Moonshi, a respected member of the Indian Muslim community in Singapore who was a friend of the Testator accelerated the appointment of British & Malayan Trustees Ltd. as additional trustees to act jointly with the then trustees in 1960 of that part of the Testator's estate ordered to be appropriated for the purposes of the Valibhoy Charitable Trust aforesaid referred to in this judgment as "V.C.T." or the said Trust.

The actual appropriation of the one-third share of the net estate in India for the purposes of the said Trust, however, took place in 1964, whereas the one-third share of the net estate in Singapore and Malaysia was so appropriated in 1962.

The time had accordingly arrived by the end of May 1964 for action to be taken to implement the said Trust and, in July 1966, the trustees sought to obtain leave for a partial implementation of the trust contained

in Clause 4(i) of the Testator's Will by seeking the court's approval of a scheme for providing scholarships for indigent Muslim students of the Gatchee community resident in or around Jetpur in the State of Gurajat (formerly Khatiawar), India. The court did not however consider that this course was the appropriate one and directed that the trustees of the Charitable Trust should purchase suitable land for building a Madarsha in or around Jetpur in exercise of the powers conferred by Clause 4(i) and authorised one of the applicants to travel to Jetpur, India for the purpose of making inquiries as to suitable land and the purchase thereof in terms of the powers conferred by the Will.

A history of this estate with reference to the legal proceedings instituted in connection with it since the Testator's death is set out in the judgment of Buttrose J. of 27th March 1961 in Suit 1380 of 1957 (see *Re Valibhoy decd.*[1]) which is the relator action instituted by the Attorney-General to which reference has already been made. This was the time when British & Malayan Trustees Ltd. were appointed trustees. It may be pertinent to note that this was also the time when appropriation for the purposes of the said Trust was ordered to be made. The trial judge also held that the said Trust was a direct, specific and express trust which it was the duty of the trustees to carry out in a proper manner and within a reasonable time and that there was no question of the exercise of the discretion of the trustees. It was an out and out bequest of the one-third share of the net estate on trust for charitable purposes. I do not think that any one would question the proposition that each one of the four trusts set out in Clause 4 is a valid charitable trust in itself.

Even after that judgment of 1961 and until the direction given in 1966, for the purchase of suitable land in Jetpur as aforesaid, little progress was made in the implementation of the charitable trusts concerned. The exhibits to the affidavit of Mr. Chellam, an officer of British & Malayan Trustees Ltd. dated 25th March 1974 set out the position as it stood by the time the case came to be argued before me.

The Order of Court of 1966 relating to the purchase of suitable land for building a Madarsha has never been implemented for the simple reason that, according to the trustees, a piece of land held under Grant No. 162 in Jetpur had already been appropriated to the said Trust in India and was suitable for building a Madarsha in or around Jetpur. Moreover, representatives of the Gatchee community in Jetpur did not seem happy about the terms of the Order of Court of August 1966 and preferred to have the money remitted direct to India. Furthermore, the trustees had also come to realise that it would not be possible to set up English schools in India. Little or no progress was made until 1971 when approaches were made to the Charity Commissioner in Gujarat State inquiring whether religious schools for members of the Gatchee community professing the Sunni Hanafee Muslim religion could be set up in Gujarat in terms of Clause 4(i). To this no satisfactory reply was forthcoming from the Charity Commissioner and as a consequence in May 1971 Mohamed Yunus Valibhoy, the eldest son of the Testator and a trustee from 1957 wrote personally to the Secretary of the Ministry of Education in Gujarat inquiring whether a Muslim religious school could be established in Jetpur. In June 1971 he received a reply to the effect that he ought to address the Director of Education in Ahmedabad.

On 5th August 1971 Mohamed Yunus Valibhoy, as one of the trustees, wrote to the Director of Education, Ahmedabad in the following terms, as he had done earlier in May 1971: —

"i. We intend to establish a Muslim Religious School (Madrasha) in or around the town of Jetpur, Rajkot District in which the 1st preference would be given to the children of Ghanchi Community who are believing the Sunni Hanafi Sect of Islam and then to all Muslim children only believing to the same school of Islam as the Ghanchi Community.

ii. If such Religious School is not allowed to be established due to laws of your state, then the trustees of the Trust would like to establish an English Language School along with the Islamic Religious teaching subjects for the persons referred in foregoing paragraph."

It will be seen that the terms of the letter addressed to the Diretcor of Education in Ahmedabad do not pose the question which Messrs. Mallal & Namazie in 1966 (see Ex. VNC 10 to the affidavit of Mr. Chellam) as solicitors for the relator posed to the British & Malayan Trustees Ltd. asking them to make inquiries as to the legality of the establishment of private schools in India for the education of persons in the English language and general matters as provided in the Will. To this Messrs. Donaldson & Burkinshaw on behalf of the trustees replied in September 1966 to British & Malayan Trustees Ltd. as follows: —

"Mr. Mohamed Yunus Valibhoy, who is familiar with present conditions prevailing in India, has informed the writer that the establishment of a private school educating persons in a language other than the State National Language is not permissible without the prior sanction of the Minister of Education for the state concerned."

In reply to the inquiry made by Mohamed Yunus Valibhoy in 1971 the Director of Education in Ahmedabad in November 1971 replied that permission required to start new schools "as required by you cannot, it is regretted, be granted".

It is significant that in 1966 (see Ex. VNC13) solicitors for the trustees wrote to solicitors for representatives of the Gatchee community who had complained of failure to implement the charitable trusts concerned explaining the preceding history of this matter and at paragraph 4 they stated that the trustees in Singapore,

"would also like to emphasise that notwithstanding the non-implementation of the trusts contained in paragraph 4(i) of the deceased's Will partial implementation has since the deceased's death been effected in India, viz.: —

(i) The establishment and the running of a religious school of instruction in the Gatchee Jamaat Building, of which your client, Ghanchi Haji Gaffar Kasam Burma wala is the President;

(ii) The utilization of certain income to provide scholarships for certain persons who required financial assistance to further their education;

(iii) The provision of school books."

At paragraph 9 of this letter of 23rd July 1966, the solicitors for the trustees stated as follows: —

"Our clients, and we believe British & Malayan Trustees Limited, are fully aware of their duties and responsibilities, and for the necessity whenever practical and possible to implement the wishes of the testator. Practical implementation in terms of Clause 4, however, is incapable of being

carried into effect for the time being due solely to lack of finance. As you will appreciate, the employment of income from capital is insufficient to purchase land and to construct schools until such time as the capital of the Trust has appreciated by investment, which the present trustees are doing in Singapore. The assets in India are negligible producing an income of approximately RS.4,000 per year at the moment, most of which is currently utilized for charitable purposes, for example for the running of the religious school of instruction mentioned previously, and the recently formed tailoring class for ladies of the Gatchee community."

It will be seen therefore that between 1966 and 1974 little has been done owing to various difficulties described above relating to the implementation of the said Trust in Jetpur or its neighbourhood for reasons of lack of finance as well as refusal on the part of the Director of Education in Ahmedabad to allow new schools to be established as requested by Mohamed Yunus Valibhoy as one of the trustees.

An Opinion was sought by or on behalf of the trustees in 1973 from Mr. M. Hidayatullah of India and this Opinion is at Ex. VNC 25, a true copy of which is attached to the affidavit of Mr. Chellam dated 23rd April 1974. Mr. Hidayatullah is the former Chief Justice of India but it is not clear in what capacity exactly he gave this Opinion. That Opinion is dated 9th December 1973. It refers to Messrs. Donaldson & Burkinshaw as the "Querists" and instructions to Mr. Hidayatullah were apparently given by two persons in Bombay one of whom is a Chartered Accountant and the other an advocate as stated at the top of the Opinion. This Opinion, no matter in what capacity it was delivered, has been of great assistance to me coming as it does from the former Chief Justice of India whose views naturally merit the most careful consideration. Moreover it comes from a person who is, so to speak, on the spot and whom one can expect to be more familiar with the practice and procedure in these matters and the workings of the administrative mind in India better than any of us out here in Singapore.

With the greatest respect, however, to all persons interested in the implementation of the said Trust including Mr. Hidayatullah, the question that had been posed to the authorities in Ahmedabad does not in my opinion communicate exactly what the Testator provided in his Will in relation to the three trusts conferred by Clause 4(i), (ii) and (iii). In the first place, the letter of Mr. Mohamed Yunus Valibhoy is couched in language, the substance of which Mr. Hidayatullah seems to have adopted in his opinion at paragraph V.

The question raised by Messrs. Mallal & Namazie referred more precisely to the language of the Will, to wit,

"one or more schools at my trustees absolute discretion *for the education of persons in the English language and general matters.*"

Mr. Mohamed Yunus Valibhoy in May 1971 however posed the question as follows: —

"If such a Religious School is not allowed to be established due to laws of your state, then the trustees of the Trust would like to establish an English Language School along with the Islamic Religious teaching subjects for the persons referred in foregoing paragraph."

The question thus posed to the education authorities in Ahmedabad involves an extension of the matters referred to by Clause 4(i) as to the establishment of one or more schools "at my trustees absolute discretion for the education of persons in the English Language and general matters." I find no reference to establishing an English language school "along with the Islamic religious teaching subjects" in the Will. The discretion of the trustees, in my opinion, did not extend to such a question being posed for the implementation of Clause 4(i) which is silent with regard to the particular subjects which are to be taught at such schools.

I do not know to what extent the addition of the words "along with the Islamic religious teaching subjects" in the inquiry addressed to the Director of Education at Ahmedabad influenced the negative answer which was received in reply to the request in that letter.

Mr. Hidayatullah himself in paragraph V of his Opinion, where he summarises the position, says, "The specific charities are the founding of religious schools with preference to students of the Gatchee community, for founding English language schools where religious instruction is to be given in addition to other subjects." I would stress the words "where religious instruction is to be given in addition to other subjects". This appears to me a particularisation of one of the subjects to be taught in the school for educating persons in the English language and general matters for which no clear or specific direction has been set out in Clause (i).

It seems to me that the inclusion of the reference to "Islamic religious teaching subjects" was an unwarranted extension of the powers conferred by the Will which merely refers to the education of persons in the English language and in general matters. However laudable the motives of the trustees might have been in this respect, I am of the view that it would have been far more satisfactory if the language of the Will had been followed more closely without particularising the subjects to be taught, especially when the trustees had already been given absolute discretion to establish one or more schools for religious instruction (known as madarshas). It was quite unnecessary to refer to "Islamic religious teaching subjects" in the inquiry relating to the establishment of one or more schools for the education of persons in the English language and general matters. I have been unable to find any reference elsewhere in the Will to this addition of "religious teaching" in connection with schools for educating persons in the English language.

As Mr. Hidayatullah states at page 9 of his Opinion under the heading "Failure of Specific Trusts", "No reasons are given why the permission is refused except what can be gathered from the word 'New'. Apparently the refusal is intended to avoid a proliferation of schools already existing. The refusal has not been based on the kind of schools namely Muslim religious schools which it is proposed to start. That reason was presumably deliberately avoided (although that might have been the real true reason) because to say so would have been a breach of the Fundamental Rights guaranteed under Art. 30 of the Constitution."

At page 11 of his Opinion, he continues, "it is clear that if the refusal of permission was based upon the *religious character* of the schools the action would have

been capable of being challenged in the High Court of Gujarat and/or the Supreme Court of India. Hence the refusal is shown to be based upon a general policy and worded as it is." In Mr. Hidayatullah's Opinion, an action against the Director of Education or the Government of India stands only a chance of success if the courts there would enter into an examination of the policy under which *new schools* are not to be started. Later, at page 12 he states, "There is also an uncertainty about the result".

In all these circumstances, particularly since nearly 25 years have elapsed since the death of the Testator, it seems to me, having regard to the fact that the Attorney-General himself concedes that practical difficulties have been encountered in the performance of the three trusts in the manner envisaged by the Testator and also concedes that the particular manner or mode of putting these trusts into effect has failed, no useful purpose would now be served by my holding that further inquiries should be instituted to determine whether at the date of the death of the Testator it was practicable to carry his intentions into effect or whether at the said date there was any reasonable prospect that it would be practicable to do so at some future time (see *in re White's Will Trusts*[2]).

I now turn to the most important aspect of the problem before me, *i.e.* whether upon the true construction of Clause 4 of the Will the impossibility of carrying out the first three trusts set out in Clause 4 but not the fourth trust which is clearly a valid charitable trust has caused the capital and income set aside for the first three trusts to become distributable as on an intestacy among those persons entitled thereto according to Muslim law. If, as I find, these three trusts have become impossible to carry out, do the trust funds appropriated towards these trusts attract the application of the cy-pres doctrine? This in turn invites the answer to the question, as counsel for the applicants has posed it: Can there be discovered from the language of the Will a general charitable intent on the part of the Testator or was his charitable intent confined to the particular trusts set out in Clause 4(i), (ii) and (iii)?

As counsel for the next-of-kin posed the question: Can a general charitable intention be inferred from the language of the Testator's Will? He proceeded to contend that there was no such general charitable intention.

Counsel for the Attorney-General, on the other hand, after making the concessions to which I have referred as to the failure of the particular mode of effecting the first three trusts submitted that the court can and indeed ought to read into this Will a general charitable intention and should hold that, even though the particular mode in which the Testator desired this intention to be effected has failed, the trust as a whole has not failed and should be applied cy-pres.

I am indebted to all three counsel who appeared in this Originating Summons for their valuable assistance and the innumerable authorities to which they drew my attention. This has in turn entailed the most careful consideration of the authorities including the cases cited as well as others, and legislation such as there is, in support of their respective points of view.

This has not been as easy a question for me to decide as at first I thought it was, having regard to the forceful arguments presented both for and against the inference of a general charitable intention on the part of the Testator quite apart from my ensuring whether or not the 3 trusts concerned have become incapable of performance either as a result of initial or supervening impossibility. I have had to consider a period of nearly 25 years since the Testator's death during which time various difficulties arose requiring resort to the courts from time to time to ensure the rapid implementation of the said Trust which for one reason or another has from time to time been frustrated.

I do not know what the position would have been had the original two executors and trustees and, later, after the death of the first of these two in 1952, the third executor and trustee named in the Will, seen fit to act expeditiously to implement the Testator's directions with regard to the establishment of schools in Jetpur or its neighbourhood. There is no evidence before me whatsoever about this except that even as late as 1966 the solicitors for the trustees had, as I have stated earlier, expressed the view that they had insufficient funds. The eldest son of the Testator, Mohamed Yunus Valibhoy, only became a trustee in 1957 after attaining the age of 21 and he of course cannot be blamed for the delay about which Messrs. Mallal & Namazie complained in 1957 as a result of which the Attorney-General intervened.

Even before it became apparent in 1966 that, mainly through lack of finance and possibly through the attitude of the authorities in Gujarat State, the trusts concerned were proving impracticable, the trustees themselves by virtue of their partial implementation of Clause 4(i) by the establishment and the running of the religious school of instruction in the Gatchee Jamaat Building and the utilisation of certain income to provide scholarships for certain persons who required financial assistance to further their education and by the provision of school books as set out in their letter of 23rd July 1966 to which reference has already been made, appear to have acted in the belief that Clause 4(i) of the Will empowered them to do so even though they might have thought that the trusts concerned were trusts for a particular specified purpose. They were able to do so with the meagre funds at their disposal at that time (Rs.4,000). It seems to me that the trustees were in fact actually right in doing so, and that they were giving effect to the donor's intentions so far as they could as though the trusts which they considered specific were at least capable of being implemented on the basis of a general charitable intention on the Testator's part.

It is clear that there is no hard and fast rule that where there is a particular charitable intention which fails there is no scope for the application of the cy-pres principle any more than there is a hard and fast rule that where there is a general charitable intention the funds available will necessarily be applied cy-pres. Some authority exists for saying that an out and out gift to charity which becomes impracticable can also be applied cy-pres according to *Sheridan and Delany* on "The Cy-pres Doctrine" at page 85.

After carefully considering the authorities, it is clear that there is a fine dividing line between those cases which have held trusts to denote a general charitable intention on the part of the donor and other cases which have held them not to indicate a general but only a particular specific intention to charity which on failure to implement falls to residue.

It seems to me that at least part of the confusion and frustration that has arisen in the implementation of the trusts concerned, apart from the initial failure soon after the Testator's death to take effective action according to the Will, could have been avoided if the trustees had in 1966 made an application for determining the question now before me.

It must be said in their favour however that they have in fact partially implemented the trusts in Clause 4 by running a school of religious instruction open to members of the Gatchee community at the Gatchee Jamaat Building which they still do, though perhaps the provision of scholarships and books may not have strictly been within the terms of the Will and were subsequently withdrawn. They also ran a tailoring class for ladies of the Gatchee community at Jetpur about which I have reservations. The fact remains that they utilised the limited funds then available in a genuine effort to meet the Testator's intentions as expressed in Clause 4. It is perhaps unfortunate that they did not raise the question now posed as to the possible application of the cy-pres doctrine at that stage. It has taken them 8 years after the order made by Ambrose J. of August 1966 (that they should purchase suitable land for establishing a madarsha in or near Jetpur) to refer the question whether or not a general charitable intention is disclosed by the Will for determination by the court. Perhaps they took the view that the trusts were so particular and specific that the question was not even worth raising without realising that, without varying the trusts, the court could still have considered directing the deletion of impracticable parts of the Testator's directions without seriously departing from the essential or paramount purposes he may have had in mind when he made his Will in 1948.

When one examines the language in which he has expressed his intentions in Clause 4 (taken in conjunction with what he has provided in Clause 6) in the light of the surrounding circumstances in 1948, what does one find to be the indicia or indications of or pointers to his intentions?

He directed —

(1) that 30% of the one-third net share (less Rs.50,000) should be employed;

(2) for the purchase of land and buildings *and/or*;

(3) building, maintaining, improving and establishing certain types of schools;

(4) that preference should be given to persons professing the Mohamedan religion of the Gatchee class as scholars at such schools;

(5) that 50% of the said share should be used for the general upkeep and maintenance of and to provide scholarships, salaries, accommodation and food for teachers etc.;

(6) that 10% should be employed for repairs and improvements to such schools; and

(7) that the remaining 10% should be invested and the income expended at the trustees' discretion for those of his 7 children as should be indigent and to pay and use any balance for the benefit of indigent members of the Gatchee class professing the Mohamedan Sunni Hanafee religion at the absolute discretion of trustees.

Eightly, at Clause 6 he provided that, on failure of paragraphs (ii) and (iii) of Clause 4 resulting from acquisition by any (Indian or State) Government of the schools established under paragraph (i), his trustees "at their complete discretion if they shall so think fit" should use and apply the whole or part of the income arising under paragraphs (ii) and (iii) for the purposes declared in paragraph (iv) *i.e.* indigent children and indigent members of the Gatchee class referred to earlier.

As I have said at the commencement of this judgment, it is hardly in dispute that each of the constituent trusts set out in Clause 4(i), (ii), (iii) and (iv) is a valid charitable trust and that, collectively, they are described by the Testator as the Valibhoy Charitable Trust whose assets the trustees hold for charitable purposes upon the 4 trusts concerned.

It cannot also be disputed that as more than one judge has held in the various authorities cited, (see, for example, *Attorney-General (N.S.W.)* v. *Perpetual Trustee Co. Ltd.*[3] and *Biscoe* v. *Jackson*,[4]) "The court leans in favour of charity and is ready to infer a general charitable intention. But little is therefore required as a ground for treating a wider purpose as the essential object of the trust" as Dixon and Evatt JJ. said at page 228 in the former case. As their Lordships also said at page 225:

> "The question is often stated to be whether the trust instrument discloses a general intention of charity or a particular intention only. But, in its application to cases where some particular direction or directions have proved impracticable, the doctrine requires no more than a purpose wider than the execution of a specific plan involving the particular direction that has failed."

One question which arises is whether the Testator herein has demonstrated his intentions in language which imposes a duty on the trustees to purchase suitable land etc. particularly where suitable land already forms part of the assets appropriated to the Trust? Further, why has he used the words "and/or" after the first direction before "build, maintain, upkeep" the types of schools he had in mind? It is clear that they were not bound to purchase suitable land etc. if suitable land was already available. If so, they could build, maintain and upkeep such a school on that land.

Secondly, was it his intention that *new* schools only should be built or would he have been satisfied that his wishes were being followed by the maintenance and upkeep of existing schools of that type or the maintenance of buildings already in existence like the Gatchee Jamaat Building where such a school is now being run?

In my judgment, the Will is couched in language, which though apparently restrictive, indicates an intention "more general than a bare intention that the impracticable direction be carried into execution as an indispensable part of the trust declared" (See Dixon J. and Evatt J. in the *Perpetual Trustee* case cited earlier at page 225).

As *Tudor* on Charities (5th Ed.) at page 242 points out, the observations cited above are of the highest possible persuasive authority in England. On the same page *Tudor* proceeds, in the light of the authorities, to suggest with diffidence the following definition of the expression "general charitable intention": —

"The expression 'general charitable intention' means either (a) an intention on the part of a donor that his gift shall be devoted to charity generally, that is to say, to the promotion of any object or purpose which is in law charitable, or (b) an intention on the part of a donor to promote a particular form of charity falling under one of the four recognised heads of charity, if possible by carrying into effect the actual wishes expressed by the donor, as to the mode of application of the gift, but if full compliance with his wishes be impossible, by promoting the particular form of charity in some way which will give effect as nearly as possible to his expressed wishes as to the mode of application of his gift."

On page 243 *Tudor* has the following to say in relation to the cy-pres doctrine: —

"When it is established that the gift was made with a general charitable intention it is never allowed to fail. If the mode of application indicated by the donor is initially impracticable, or in process of time subsequently becomes impracticable, the gift will be carried into effect under a scheme the provisions of which will conform as nearly as possible to the expressed wishes of the donor."

but on page 244 he states that this doctrine does not apply: —

"if it is not possible to impute to the donor a general charitable intention, but only the intention to benefit a particular institution in a particular way or to promote a particular charitable purpose in a particular way, so that to apply the subject-matter of the gift in any other way would be to ignore the donor's intention. The donor has made it clear that he is disposed to be charitable in his own way and in no other way and that, if he cannot be charitable in his own way, the gift is to fail *ab initio*."

The following are strong cases in support of the application of the cy-pres doctrine based on the construction of the language used in the instrument or Will creating the trust concerned and on the facts and have guided me on the considerations which apply in deciding that a general charitable intention is revealed *viz.*, the *Perpetual Trustee Co. Ltd.* case and *Biscoe* v. *Jackson* mentioned earlier. Other helpful cases are *In re. Whittaker decd.*,[5] *In re. Templemoyle Agricultural School*,[6] *Wallis* v. *Solicitor-General for New Zealand*.[7]

On the other side of the line have fallen a number of cases where no such general charitable intention was inferred having regard to the particularity of the specified objects which failed without any indication of a wider purpose as being the essential or paramount object of the trust. I mention three such cases on which strong reliance was placed by counsel for a resulting trust for the next-of-kin — *In re Packe*,[8] *In re Wilson*,[9] and *Re Good's Will Trusts*.[10] There are many more.

It is in *In re Wilson* that the oft-cited division of the authorities into two classes of cases by Parker J. occurs right at the commencement of his judgment in the first two paragraphs thereof and I do not propose to repeat them here. In the first class fall cases where although, in form, a gift is given for a particular charitable purpose it is possible to say, notwithstanding such form, that the paramount intention is to give the property for a general charitable purpose. In such cases, even though precise directions are engrafted as to the manner in which such general gift shall take effect, these precise directions can be ignored if they become impossible to fulfil and a scheme will be directed. In the second class fall cases where a gift is for a particular charitable purpose *and for that purpose only* which becomes impossible to carry out. Such a gift fails altogether.

The bequest in *Wilson's* case was to endow or provide salary for a schoolmaster of a school and house to be built (by voluntary subscriptions from parishioners) on a particular spot on a hill near a gate dividing B. and W. Commons, with precise stipulations as to how hard the schoolmaster should work and what subjects he should teach to pupils some of whom could be admitted free etc.

Parker J. held that the particular gift failed because he could not disregard all the particular directions as not forming part of the essence of the gift. The evidence showed that there was no reasonable chance of any such school being established at or near the spot where the Testator directed it to be built. The learned judge tried to save the gift by applying his mind to the question whether a general charitable intention to promote higher education in the district was revealed. He found that the gift was conditional on a school and house being first built because the Testator was dissatisfied with the provisions for education in the district concerned and desired to provide for the teaching of certain other subjects which had not previously been taught. His Lordship could not read into the Will any general intention to provide higher education and the endowment of salary for a schoolmaster failed.

At the foot of page 321 he stated, "any particular gift may, at any rate if the particularity is not very great, be construed as a general gift for the purpose of deciding whether it falls within one class or within the other class. Of course, where there is a particular gift for charitable purposes, if you come to analyse the intentions of the testator, the intentions of the testator must have been to benefit those persons who will, if the particular direction is carried out, take the benefit of that particular direction, and, if from that you draw an inference that the general and paramount intention was to benefit those persons, it enables you to disregard the particularity of the gift and to give effect to that general intention as opposed to the particular intention."

I have also been considerably impressed by the observations of Dixon and Evatt JJ. in the *Perpetual Trustee Co. Ltd.* case (earlier cited) in relation to the facts of that case as well as by what Harman J. said in *in re Whittaker* at page 958 to say nothing of Kay J. in *Biscoe* v. *Jackson*. I do not propose to detail the facts of those cases which are clear from the headnotes to those cases.

At page 226 of the judgment of Dixon and Evatt JJ. the following passage occurs: —

"The problem will at times present itself as that of distinguishing between an immediate and a remoter purpose and of deciding whether the remoter is dominant or essential and the immediate subordinate or accidental. At other times it will appear as a question whether the existence of a main or paramount purpose is manifested notwithstanding that the declaration of the charitable trust takes the form of a direction to carry out a detailed plan."

Harman J. at page 958 of the *Whittaker* case said: —

"In my judgment this was a fund not subject to a condition. *It was devoted to charity from the outset and could have been used for that purpose from the outset if the money could have been raised.* If the gift be devoted to charity, then the fact that difficulties arise during the intervening period cannot be allowed to cause it to fail."

The portion italicized is apposite to the facts of the present case (see the letter of solicitors for the trustees dated 23rd July 1966 (Ex. VNC 13) at paragraph 9).

I find that, on a proper construction of Clause 4 of the Testator's Will, he has evinced a general charitable intention in favour of the advancement of education (both religious as well as in English and other general subjects) amongst members of the Gatchee community to which he probably belonged. His dominant intention was to benefit that community by giving them opportunities which perhaps he himself may have lacked in his younger days. After having made his fortune in Singapore he considered the town or district in India from which he originally came as a suitable starting-point at or near which to commence the fulfilment of his intentions by a trust he called the Valibhoy Charitable Trust in favour of a wider charitable purpose than the mere provision of new schools at a particular spot. He has made clear provision for the relief of poverty by Clause 4(iv) as well. In my considered judgment, the said Trust called the Valibhoy Charitable Trust was not motivated by a purely parochial or narrow and circumscribed intention.

In all the circumstances, notwithstanding Clause 6 which clearly shows that the Testator never foresaw nor could have foreseen the events which have now arisen, the three trusts with which I am now concerned have not failed but should be carried into effect cy-pres by a scheme which conforms to his directions as closely as possible. I direct that such a scheme should be prepared and submitted to me for approval in Chambers.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Oehlers & Choa.*

MALAYSIAN REPORTS

SAFETY INSURANCE COMPANY SDN. BHD. v. CHOW SOON TAT

[F.C. (Gill C.J., Raja Azlan Shah and Wan Suleiman F.JJ.) November 16, 1974]

[Kuala Lumpur — Federal Court Civil Appeal No. 81 of 1973]

Practice and Procedure — Arbitration — Fire insurance — Provision in fire insurance policy for reference to arbitration — Time fixed in agreement — Lapse of time — Application to extend time — Undue hardship — Arbitration Act, 1952, s. 28.

Insurance — Arbitration — Lapse of time — Extension.

In this case a fire insurance policy had been taken out by the respondent to insure his construction materials at a work site. A fire occurred at the work site on December 30, 1968 causing the total destruction of the respondent's store. The respondent submitted a claim or $154,702.55 on January 5, 1969, but the appellant did not write to the respondent rejecting his claim or making a counter-offer. The respondent was therefore unable to refer the matter to arbitration within the period of one year from the happening of the loss or damage. It was only on June 20, 1972 that the appellant informed the solicitors for the respondent that it was repudiating liability under condition 19 of the policy which relieved it from any liability after the expiration of twelve months from the date of the fire. The appellant maintained that since the respondent had failed to resort to arbitration under condition 18 of the policy within twelve months of the date of the fire, the respondent's right to arbitration was time barred. The respondent thereupon applied for enlargement of time. Mohamed Azmi J. allowed the application and the appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) in this case the claim which was made was not rejected, so that no dispute or difference arose as to the amount of any loss or damages, and therefore the respondent could not have referred the matter to arbitration under condition 18 of the policy;

(2) if the intention of the appellant all along was to deny liability altogether on the respondent's claim it should have written to the respondent to make that perfectly clear to him. In the circumstances the respondent had made out a case of undue hardship, that is, greater hardship than the circumstances warrant or hardship greater than that which in justice, a claimant should be called upon to bear;

(3) the learned trial judge in this case exercised his judicial discretion correctly in granting the extension of time on the ground of undue hardship. The learned trial judge had taken all the relevant factors into account in the exercise of his discretion and there was nothing wrong in the way in which he dealt with the application.

Cases referred to:-

(1) *Liberian Shipping Corporation* v. *A. King and Sons Ltd.* [1967] 1 All E.R. 934.

(2) *Atlantic Shipping and Trading Co. Ltd.* v. *Louis Dreyfus & Co.* [1922] 2 A.C. 250 at p. 255.

(3) *Wong Lang Hung* v. *National Employees Mutual General Insurance Association Ltd.* [1972] 2 M.L.J. 191.

(4) *F.E. Hookway & Co. Ltd.* v. *H.W. Hooper & Co.* [1950] 2 All E.R. 842.

(5) *Lynchburg Cotton Mills* v. *Travellers* (1905) 140 Fed. Rep. 718.

(6) *Scott* v. *Avery* (1956) 25 L.J. Ex. 308.

(7) *Heyman* v. *Darwins Ltd.* [1942] A.C. 356, 377.

(8) *Viney* v. *Bignold* (1888) 20 Q.B.D. 172.

(9) *Bruce* v. *Strong* [1951] 2 K.B. 447.

(10) *Cameron* v. *Cuddy* [1914] A.C. 651, 656.

The following authorities were also cited in argument: *Curtis* v. *Home Insurance* (1865) 1 Biss. 485, cited in *MacGillivray* on Insurance Law, 4th Ed. S. 1794; *Thompson* v. *Phoenix* (1893) 51 Fed. Rep. 715, cited in *MacGillivray* on Insurance Law, 4th Ed. S. 1794; *Hughes* v. *Metropolitan Railway Co.* [1874-80] All E.R. Rep. 187.